Supreme Court, U.S.
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No. 99-672

In the Supreme Court of the United States

KATHRYN I. BLANKENSHIP, PETITIONER

v.

ALAN A. MCDONALD, JUDGE,
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

MARLEIGH DOVER
ROBERT M. LOEB
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether petitioner stated a claim under 42 U.S.C. 1985(2) of a conspiracy to injure a party or witness on account of testimony before a "court of the United States," when she was not a party to the proceeding at issue, and the proceeding was an administrative hearing.

2. Whether an employee of the judicial branch may bring an action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against a district court clerk and judge regarding the termination of her employment, even though Congress has established a comprehensive remedial scheme for job-related disputes involving federal employees under which judicial branch employees have only limited remedies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 176 F.3d 1192. The opinion of the district court (Supp. App. 1-14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1999. A petition for rehearing was denied on July 22, 1999 (Pet. App. 8-9). The petition for writ of certiorari was filed on October 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, pursuant to the authority granted by Congress, 28 U.S.C. 753, 756, the District Court for the Eastern District of Washington appointed petitioner to the position of court reporter. Pet. App. 2. Petitioner worked primarily in the courtroom of respondent United States District Court Judge Alan A. McDonald. Respondent James Larsen, the Clerk for the Eastern District of Washington, supervised the court reporters. *Ibid.*

The Eastern District has adopted an equal employment opportunity (EEO) plan in conformance with the directions of the Judicial Conference. See Discrimination Complaint Procedures, Equal Employment Opportunity Plan, United States District Court for the Eastern District of Washington (Mar. 1993) (*reprinted in* C.A. E.R. 86-100). The EEO plan provides an administrative complaint and hearing mechanism to resolve claims of discrimination and retaliation or reprisal for alleging discrimination or serving as a witness in connection with an EEO complaint. Supp. App. 6-8.

In February 1994, deputy clerk Christine Mearns filed an administrative complaint of sex and handicap discrimination under the Eastern District's EEO Plan. Supp. App. 2. Petitioner was subpoenaed to testify at the administrative EEO hearing on the complaint. Pet. App. 3; Supp. App. 2. Petitioner alleges that, during the course of her testimony at the EEO hearing, she testified that Judge McDonald had required her to act improperly on several occasions, such as requiring her improperly to certify and to notarize documents. *Ibid.* Petitioner claims that following her testimony at the EEO hearing her relationship with Judge McDonald deteriorated. C.A. E.R. 9-10.

In November 1994, petitioner received a negative performance report, which stated that she had missed deadlines for filing transcripts. Supp. App. 3. In February 1995, respondent Larsen recommended that the District Court terminate petitioner's employment. Pet. App. 4. The Court discharged petitioner effective March 3, 1995. C.A. E.R. 14. Each of the then-active judges in the Eastern District signed the termination letter. Pet. App. 4; Supp. App. 3. Petitioner did not file a complaint under the Eastern District EEO Plan. *Ibid.*

2. Petitioner filed suit in federal district court against Judge McDonald, Clerk Larsen, and their wives. Supp. App. 1. Alleging that she was fired in retaliation for her testimony at the EEO hearing, she asserted claims under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of her First and Fifth Amendment rights, as well as claims under 42 U.S.C. 1985(2) and (3) and state law. C.A. E.R. 15-23. She sought compensatory, exemplary and punitive damages. *Id.* at 23-24.

The district court granted respondents' motion to dismiss. Supp. App. 1-14. The court held that petitioner's *Bivens* claims were precluded under the analysis set forth in *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988). Supp. App. 4, 8-11. The court reasoned that Congress's failure to provide petitioner and other judicial branch employees with a more complete remedy was not inadvertent. *Ibid.* The district court also dismissed petitioner's remaining claims. *Id.* at 11-14. As to the Section 1985(2) claim, the district court noted that petitioner conceded that "her section 1985 claim is not cognizable [under Ninth Circuit precedent] because

she was not a party to the proceedings in which she testified." *Id.* at 13.

3. Petitioner appealed the district court's ruling, and the court of appeals affirmed. Pet. App. 1-7. The court rejected petitioner's argument "that because she has no administrative or judicial remedies under the [Civil Service Reform Act] as a member of the excepted service, she is entitled to assert a *Bivens* claim." *Id.* at 4-5. The court held that the Civil Service Reform Act (CSRA) contains an "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Id.* at 5 (quoting *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983)). The court held that it would be improper to permit a *Bivens* action here because "congressional action has not been inadvertent in providing certain remedies and denying others to judicial employees." Pet. App. 6. The court explained that "Congress has given judicial employees certain employment benefits and remedies, such as back pay, severance pay, family and medical leave, and health and retirement benefits. Congress has withheld other benefits and remedies, such as review of adverse personnel decisions." *Ibid.* The court concluded that "[t]his demonstrates that the lack of more complete remedies was not inadvertent." *Ibid.* The court also rejected petitioner's claim under 42 U.S.C. 1985(2) because, in *David* v. *United States*, 820 F.2d 1038, 1040 (1987), the Ninth Circuit had previously held that Section 1985(2) provides a remedy only to a litigant who is hampered in presenting an effective case, not to a witness. Pet. App. 7.

ARGUMENT

The court of appeals correctly affirmed the district court's dismissal of petitioner's complaint. Petitioner

did not state a valid claim under Section 1985(2) because her testimony in an administrative EEO hearing is not testimony before a "court of the United States." This case therefore is not a suitable vehicle to resolve the conflict among the courts of appeals on the question whether Section 1985(2) provides a remedy to witnesses as well as litigants. Further, the court of appeals correctly dismissed petitioner's *Bivens* claims, and its decision does not present a conflict with any other court of appeals that warrants this Court's review. This Court recently denied review of the *Bivens* issue raised by petitioner. See *Lee* v. *Hughes*, 145 F.3d 1272 (11th Cir. 1998), cert. denied, 119 S. Ct. 1026 (1999). Review of that issue is likewise not warranted here. Therefore, the petition should be denied.

1. Petitioner first contends (Pet. 8-14) that this Court's review is needed to resolve a conflict among the courts of appeals regarding the construction of 42 U.S.C. 1985(2). Although there is a conflict, this case does not present a suitable vehicle to resolve it, because petitioner cannot state a claim under Section 1985(2) regardless of how the Court might resolve the conflict.

Section 1985(2) prohibits conspiracies "to deter, by force, intimidation, or threat, any party or witness in any court of the United States * * * from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified." 42 U.S.C. 1985(2). The statute permits a "party" so injured to sue for recovery of damages "occasioned by such injury." 42 U.S.C. 1985(3).

The Ninth Circuit has construed the statute to provide a damages remedy only to a "litigant [who] was hampered in being able to present an effective case," and not to a witness who is not a party. *David* v. *United*

States, 820 F.2d 1038, 1040 (1987). See also *Rylewicz* v. *Beaton Servs., Ltd.*, 888 F.2d 1175, 1180 (7th Cir. 1989). This construction has been rejected by the Third and Tenth Circuits. See *Heffernan* v. *Hunter*, 189 F.3d 405, 409-411 (3d Cir. 1999); *Brever* v. *Rockwell Int'l Corp.*, 40 F.3d 1119, 1125 & n.7 (10th Cir. 1994).

This case does not, however, present a suitable vehicle for resolving the conflict on the question whether the statute provides a remedy to a non-party witness, because petitioner has not stated a valid claim under Section 1985(2) however that question might be resolved. The statute applies only to testimony before a "court of the United States." 42 U.S.C. 1985(2). That term includes only courts (such as federal district courts) created by Act of Congress "the judges of which are entitled to hold office during good behavior." 28 U.S.C. 451. Petitioner's complaint here fails to state a Section 1985(2) claim because the testimony for which she allegedly was terminated was testimony in an administrative EEO hearing, *not* before a court of the United States sitting in its Article III capacity. Every court that has addressed the issue has held that Section 1985(2) does not encompass testimony given at an administrative proceeding. See *Deubert* v. *Gulf Fed. Sav. Bank*, 820 F.2d 754, 758 (5th Cir. 1987); *Morast* v. *Lance*, 807 F.2d 926, 930 (11th Cir. 1987); *Kimble* v. *D.J. McDuffy, Inc.*, 648 F.2d 340, 347 (5th Cir.) (en banc), cert. denied, 454 U.S. 1110 (1981); *Graves* v. *United States*, 961 F. Supp. 314, 319 (D.D.C. 1997); *Carter* v. *Church*, 791 F. Supp. 298, 300 (M.D. Ga. 1992) (testimony to EEOC not covered).

In the court of appeals, petitioner did not contest that Section 1985(2) is limited to proceedings before a "court of the United States." Petitioner argued, however, that the administrative EEO hearing at which she testified

should be deemed such a court because the hearing was conducted by Chief Judge Quackenbush in a courtroom. Plaintiff's Opp. to Motion to Dismiss 23-24 (C.A. E.R. 124-125). That argument lacks merit, because Judge Quackenbush was presiding over an administrative proceeding, pursuant to the Eastern District's EEO Plan, C.A. E.R. 97-98, and was not sitting in his capacity as an Article III judge over an Article III case or controversy.[1]

2. Petitioner also asks (Pet. 14-24) this Court to review the dismissal of her *Bivens* claims. In accord with the Eleventh Circuit's ruling in *Lee*, *supra*, however, the court of appeals correctly rejected petitioner's contention that judicial branch employees may bring *Bivens* claims against their supervisors for work-related disputes. This Court recently denied the petition for a writ of certiorari in *Lee*. 119 S. Ct. 1026 (1999). It should likewise deny the petition in this case.

a. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court permitted the plaintiff to sue for money damages federal officers who violated his Fourth Amendment

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[1] In her reply brief on appeal, petitioner claimed (for the first time) that the retaliation she alleged was based in part on testimony that she gave earlier in a civil case and in a disciplinary hearing against an attorney. Appellant Reply Br. 22. In her complaint, however, petitioner claimed retaliation based on only her testimony at the administrative EEO hearing. The complaint did not mention her testimony in the civil case and referenced her testimony at the attorney disciplinary hearing only in describing the events about which she testified at the EEO hearing. Complaint 7-8 (C.A. E.R. 7-8). Moreover, in her response to respondents' motion to dismiss in district court, petitioner identified only her testimony at the EEO hearing as the testimony protected from retaliation under Section 1985(2). Plaintiff's Opp. to Motion to Dismiss 23-24 (C.A. E.R. 124-125).

rights. In permitting that suit, the Court relied on several important considerations: (1) Congress had not provided a remedy; (2) there were "no special factors counselling hesitation in the absence of affirmative action by Congress"; and (3) there was "no explicit congressional declaration" that money damages not be awarded. *Id.* at 396-397. Following *Bivens*, the Court permitted similar damage actions against federal officials under the Fifth Amendment's Due Process Clause and the Eighth Amendment's Cruel and Unusual Punishments Clause. Again, each time the Court noted the absence of an alternative remedial scheme created by Congress and the absence of other "special factors" counseling against the provision of a court-created damages remedy. See *Davis* v. *Passman*, 442 U.S. 228, 245-247 (1979); *Carlson* v. *Green*, 446 U.S. 14, 18-20 (1980).

This Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). See also *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994). The Court has held that *Bivens* actions against individual federal officials are precluded when Congress has established a statutory remedial scheme to handle a particular category of disputes with the federal government, even if the remedial scheme does not provide redress for the particular alleged constitutional wrong. See *Chilicky*, *supra*; *Bush* v. *Lucas*, 462 U.S. 367 (1983). "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," it is inappropriate for a court to afford "additional *Bivens* remedies." *Chilicky*, 487 U.S. at 423. The "concept of 'special factors counselling

hesitation in the absence of affirmative action by Congress' has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *Ibid.*

Petitioner cannot maintain a *Bivens* action here because Congress has, through the Civil Service Reform Act (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, established a comprehensive statutory remedial scheme to handle employment disputes with the federal government. In the CSRA, Congress "comprehensively overhauled the civil service system," *Lindahl* v. *OPM*, 470 U.S. 768, 773 (1985), and created a "new framework for evaluating adverse personnel actions against [federal employees]," *id.* at 774. The CSRA details the protections and remedies available to federal employees in such actions, including the availability of administrative and judicial review. See *United States* v. *Fausto*, 484 U.S. 439, 443 (1988). That "elaborate remedial system," which "has been constructed step by step, with careful attention to conflicting policy considerations," may not "be augmented by the creation of a new judicial remedy for the constitutional violation at issue." *Bush*, 462 U.S. at 388.

b. Petitioner argues (Pet. 19-21) that the CSRA does not preclude her *Bivens* action, because, as a preference-eligible member of the excepted service (Pet. App. 4), she had no right to file a petition challenging the adverse personnel action with the Office of Special Counsel of the Merit Systems Protection Board. The court of appeals correctly rejected that contention. See *id.* at 4-6; *Lee*, 145 F.3d at 1275-1276. In *Bush*, this Court found that the "comprehensive procedural and substantive provisions" (462 U.S. at 368) of the CSRA constituted a "special factor counselling" hesitation against permitting a *Bivens* action even though civil

service remedies offered "a less than complete remedy" for the alleged First Amendment violation (*id.* at 372-373). That conclusion applies with equal force to petitioner's First and Fifth Amendment claims here.

The courts may not circumvent Congress's decision in the CSRA not to provide a statutory review mechanism for claims like petitioner's by permitting *Bivens* actions. This Court rejected that approach in *Fausto*, when it held that the CSRA precluded an exempt, non-preference eligible, federal employee from suing under the Back Pay Act even though the CSRA did not provide the employee a right to judicial review of the claims that he asserted. Because the CSRA is a comprehensive scheme and Congress's failure to provide judicial review could not be deemed an inadvertent omission, the Court held that the limitations in the Act may not be circumvented through resort to other remedies. *Fausto*, 484 U.S. at 447-455.[2]

Congress has deliberately excluded court personnel from the substantive provisions of the CSRA relating to adverse employment actions. Instead, Congress has extended only limited employment benefits and remedies to court personnel. Most significantly, judicial employees are entitled to backpay plus interest under

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[2] The Court applied the same reasoning in *Chilicky*. In that case, the plaintiff claimed that federal officials administering the Social Security disability program violated his due process rights. 487 U.S. at 420. If limited to the Social Security review scheme, the plaintiff at most could have been granted retroactive disability benefits, and had *no* possibility of receiving additional redress for the harms caused by the alleged constitutional violation. Further, the Act provided no monetary remedy against the alleged offending officials. *Id.* at 424-425. The Court nonetheless held that the Social Security Act's "remedial scheme" precluded the assertion of a *Bivens* claims against the individual officials. *Id.* at 414.

certain circumstances, 5 U.S.C. 5596 (1994 & Supp. IV 1998), as well as severance pay, 5 U.S.C. 5595.[3] In the main, Congress has permitted the judicial branch to manage its own personnel matters. Thus, district courts have the authority to appoint and remove court reporters, 28 U.S.C. 753 (1994 & Supp. III 1997); 28 U.S.C. 756, and the Judicial Conference has the authority to "determin[e] standards" for the qualifications of court reporters. 28 U.S.C. 753 (1994 & Supp. III 1997). In 1990, Congress removed the employees of the Administrative Office of the United States Courts (AO) from the CSRA. See AO Personnel Act of 1990, Pub. L. No. 101-474, § 3(a)(5), 104 Stat. 1097, Congress explained that the "separation of powers" counseled that the judicial branch should be "mostly free" of executive branch supervision of its personnel matters. See H.R. Rep. No. 770, 101st Cong., 2d Sess. 5 (1990).[4]

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[3] Court-appointed personnel are also covered by the Family and Medical Leave Act, 5 U.S.C. 6381(1) (1994 & Supp. IV 1998), and the Federal Employees Family Friendly Leave Act, 5 U.S.C. 6301(2). They are entitled to employment benefits such as health insurance, 5 U.S.C. 8901(1)(A) (1994 & Supp. III 1997), life insurance, 5 U.S.C. 8701(a)(1), and retirement benefits, 5 U.S.C. 8331(1)(A) (1994 & Supp. IV 1998).

[4] Although petitioner is not an employee of the AO and thus does not have remedies under the 1990 Act, those remedies are similar to petitioner's remedies under the court-adopted EEO plans and the Back Pay Act. In the 1990 Act, Congress ordered the AO to create an administrative scheme similar to the one available to petitioner here to handle employment disputes, including those involving claims of discrimination and claims of retaliation or reprisal for invoking or participating in the EEO process. See H.R. Rep. No. 770, *supra*, at 5, 7-8. At the same time, Congress extended the Back Pay Act to provide a back pay remedy in addition to the administrative review scheme. *Id.* at 12. Congress referred to the 1990 Act as establishing a "comprehensive

Those decisions reflect Congress's determination regarding the appropriate balance between respect for the independence of the judicial branch and protection of the rights of judicial branch personnel. Recognition of the *Bivens* action that petitioner seeks to bring would upset that congressionally mandated balance.

c. Petitioner also errs in suggesting (Pet. 21-24) that this case raises a constitutional question because, she asserts, she lacked any remedy to vindicate her constitutional rights. Whether or not the Constitution requires that there be a remedy to vindicate every constitutional right, petitioner had an adequate remedy here. Petitioner could have sought review of her retaliation claim through the administrative EEO process adopted by the district court at the direction of the Judicial Conference, as contemplated by Congress. See pp. 2, 11, *supra*. The court's EEO plan provides informal and formal administrative procedures to resolve complaints (such as petitioner's) of discrimination and reprisal. C.A. E.R. 87-100.[5] Had she prevailed in

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personnel system" (*id.* at 1) for AO employees and recognized that this comprehensive system was similar to that available to "the rest of the judicial branch" (*id.* at 5). Thus, Congress demonstrated its approval of the remedies available to petitioner here by extending the same remedies to AO employees.

[5] When a complaint is filed, the court-appointed EEO Coordinator conducts an investigation and prepares a report. If the EEO Coordinator recommends rejection of the employee's claim, the complainant may ask that the matter be further reviewed. Upon receipt of such a request, the Chief Judge or his designee conducts any additional investigation deemed necessary, determines whether to hold a formal hearing, and issues a final decision regarding the complaint. C.A. E.R. 95-99. There is no merit to petitioner's contention (Pet. 22 n.9) that this procedure is inadequate because the Clerk of the Court is a party to her complaint and the Chief Judge was one of the judges who signed her

that process, petitioner would have been able to seek reinstatement from the Chief Judge. She would also have been entitled to restoration of any lost pay, with interest, under the Back Pay Act.[6]

d. Petitioner's reliance (Pet. 16-19) upon *Davis* v. *Passman*, 442 U.S. 228 (1979), is misplaced. In *Davis*, the Court permitted a former congressional staff member to bring a *Bivens* action for sex discrimination against a congressman. In *Davis*, however, the Court did not address the preclusive effect of the CSRA, which had been enacted only a few months before *Davis* was decided. *Lee*, 145 F.3d at 1275. Moreover, in *Bush*, the Court explained that it had relied upon the absence of *any* equitable or monetary remedy for the terminated staff member in permitting the *Bivens* action in *Davis*. See 462 U.S. at 377 & n.13. Unlike petitioner here, the plaintiff in *Davis* had no remedial process and no opportunity for back pay or reinstatement. See also

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discharge order. The procedures provide for an impartial investigator if the EEO Coordinator is directly involved in the complaint, as well as for a designee to fulfill the duties of the Chief Judge. C.A. E.R. 97.

[6] Under the Back Pay Act, a covered federal employee who is found "by appropriate authority under applicable law, rule, [or] regulation" to have been "affected by an unjustified or unwarranted personnel action" resulting in a loss of pay is entitled, "on correction of the personnel action," to the lost pay with interest. See 5 U.S.C. 5596(b)(1)(A) and (b)(2)(A). The duly adopted EEO Plan constitutes an "applicable law, rule, [or] regulation," and a decision that an employee was improperly discharged would be a finding by an "appropriate authority" that the employee was "affected by an unjustified or unwarranted personnel action," thus entitling the employee, "on correction of the personnel action" (5 U.S.C. § 5596(b)(1)(A)) to back pay, with interest. See *Fausto*, 484 U.S. at 454 (within CSRA scheme, agency is an "appropriate authority" for purposes of Back Pay Act).

462 U.S. at 390-391 (Marshall, J., concurring) (Congress considered a remedy under the Back Pay Act to provide full compensatory relief for adverse employment actions in violation of the First Amendment).

e. Finally, petitioner errs (Pet. 14-15) in contending that this Court's review is warranted to resolve a conflict among the courts of appeals on the *Bivens* issue.

Like the petitioner in *Lee* v. *Hughes*, *supra*, petitioner here cites *Duffy* v. *Wolle*, 123 F.3d 1026 (8th Cir. 1997), cert. denied, 523 U.S. 1137 (1998), as creating a conflict. That purported conflict does not warrant this Court's review. The Eighth Circuit in *Duffy* was not presented with the considerations central to the reasoning of the court in this case; and, when presented with those considerations in a future case, the Eighth Circuit might well reach the same result as the court did here.

In *Duffy*, the Eighth Circuit held that a court-adopted EEO Plan, standing alone, did not preclude a probation officer from asserting a *Bivens* sex discrimination claim against the judges who elected not to promote him to the position of Chief Probation Officer. *Duffy*, 123 F.3d at 1034-1035. As the Eleventh Circuit noted in *Lee*, however, "the defendants in *Duffy* never suggested that the CSRA preempted plaintiff's claim, but rather argued only that plaintiff's *Bivens* claim should have been dismissed because the local EEO Plan provided plaintiff with a remedy." *Lee*, 145 F.3d at 1276 n.4. Thus, the Eighth Circuit did not address the effect on *Bivens* claims of the CSRA, the central consideration behind the decision of the court of appeals in this case.

Moreover, in *Duffy* the Eighth Circuit relied on the defendants' failure to "present[] * * * support" for the

conclusion that the remedial scheme available to judicial employees did not result from congressional inadvertence. *Duffy*, 123 F.3d at 1035. As we have explained at pages 10-11, *supra*, there is in fact substantial evidence that Congress deliberately chose to provide judicial personnel with certain, limited remedies, including the Back Pay Act, and otherwise to permit the judicial branch to manage its personnel matters. That evidence was not considered by the Eighth Circuit in *Duffy*. Indeed, the court in *Duffy* erroneously believed that there were no statutory remedies available to judicial branch employees.

Guercio v. *Brody*, 814 F.2d 1115 (6th Cir. 1987), also does not support further review here. In *Guercio*, the Sixth Circuit held that a bankruptcy judge did not possess absolute immunity from a First Amendment retaliation claim brought by his former secretary. The claim at issue in *Guercio* was not an EEO claim, nor was it redressable through an EEO administrative hearing. The question whether a *Bivens* action by a judicial branch employee is permitted in light of the CSRA, a court-created EEO plan, and the Back Pay Act remedy was never briefed by the parties and was not addressed by the Sixth Circuit. Hence, the Sixth Circuit's decision does not conflict with the reasoning or decision of the court of appeals here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General[7]

DAVID W. OGDEN
Acting Assistant Attorney General

MARLEIGH DOVER
ROBERT M. LOEB
Attorneys

JANUARY 2000

[7] Respondents were represented by private counsel in the court of appeals but requested that the Department of Justice represent them in this Court. This brief is filed in our capacity as counsel for the individual respondents, not on behalf of the United States, which is not a party to this litigation.